STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 26, 2002
v	No. 222686 Wayne Circuit Court
ANTHONY WEST, Defendant-Appellant.	LC No. 98-011795 ON REMAND

Before: Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court.[1] In our previous opinion, we held that portions of the trial court's findings were attributed to codefendant Herman Coleman's statements, but found that there was sufficient evidence, without Coleman's statements, to support defendant's conviction.[2] In lieu of granting defendant leave to appeal, the Supreme Court vacated the judgment in our unpublished, per curiam opinion and remanded the case to this Court "for reconsideration of the issue whether the error identified in the second paragraph of the Court of Appeals opinion was harmless beyond a reasonable doubt. [*People v Anderson (After Remand)*], 446 Mich 392; 521 NW2d 538 (1994)."[3] Upon reconsideration, we again affirm.

I. Basic Facts and Procedural History

In the early morning hours of August 22, 1998, police responded to a house fire on St. Joseph street in Detroit. Because the windows were barred, firefighters had to pry the bars off to gain entry. A strong smell of gasoline alerted police of possible arson. When the fire was contained, firefighters discovered a burned corpse in the bathtub; the victim had perished due to soot and smoke inhalation as well as severe burns.

[1] *People v West*, order of the Supreme Court, entered September 10, 2002 (Docket No. 120710).

[2] *People v West*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2001 (Docket No. 222686).

[3] We note that when our entire judgment is vacated, we are required to reconsider each issue raised on appeal because the law of case doctrine does not apply. *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 94; 572 NW2d 246 (1997).

Defendant and codefendant Coleman were tried together in a bench trial. Although defendant did not testify, his statement was read into the record. According to his statement, at about 3:00 a.m. on the day of the fire, he walked with "Slim"[4] who carried something smelling of gasoline. Slim told defendant that he was going to burn down a house and that he had been paid an "eight ball"[5] to burn down a house on St. Joseph street and a house on Pierce street. Coleman asked defendant to serve as a lookout. Defendant watched as Coleman lit a rag and threw a glass jar at the house. Defendant saw flames and then took off running. Defendant indicated that he did not know anyone was in the house.

Coleman also did not testify. However, the prosecution read into the record two statements made by Coleman to police officers which tended to place responsibility on defendant and minimize Coleman's culpability. Defense counsel objected to Coleman's statements being offered against defendant. The prosecution then clarified that the statements were only being offered against Coleman. The trial court agreed that the statements would only be admissible against Coleman, not defendant.

Following a bench trial, defendant was convicted, as an aider and abettor, MCL 767.39 of second-degree murder, MCL 750.317. In delivering its verdict, the trial court combined the statements from both defendants and referenced facts that were established only by Coleman's statements. Defendant was sentenced to sixteen to twenty five years' imprisonment as a third habitual offender, MCL 769.11.

II. Codefendant's Statements

Defendant first argues that the trial court, in determining defendant's guilt, improperly relied upon Coleman's statements. Defendant frames the issue on appeal as whether, without Coleman's statements, there was sufficient evidence to sustain his conviction. Based on the Supreme Court's order, we rephrase the issue as whether the trial court's alleged reliance on Coleman's statements was a harmless error.

Although the admissibility of Coleman's statements is not before us on appeal, we recognize that the trial court's alleged reliance on Coleman's statements raises the specter of MRE 802, the hearsay rule, and the Confrontation Clause of the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20. Admission of hearsay testimony in violation of the Confrontation Clause, where preserved, is not a structural error that defies harmless error analysis. *People v Smith,* 243 Mich App 657, 690; 625 NW2d 46 (2000). In cases where the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's statement is so insignificant by comparison, it may be clear beyond a reasonable doubt that the improper use of the statement was harmless error. *People v Banks,* 438 Mich 408, 427; 475 NW2d 769 (1991), quoting *Schneble v Florida,* 405 US 427, 430; 92 S Ct 1056; 31 L Ed 340 (1972). The harmless error test requires this Court to quantitatively assess the evidence to determine whether, without the improperly admitted evidence, there is a "reasonable

[4] "Slim" is the street name for Coleman.

[5] Rock cocaine.

possibility" that the fact finder would have acquitted. *People v Whitehead*, 238 Mich App 1, 9; 604 NW2d 737 (1999), citing *Anderson*, *supra* at 405-406, quoting *Arizona v Fulminante*, 499 US 279, 295; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

In this case, defendant was convicted after a bench trial. The trial court rendered its verdict against both defendants at the same time. In its recitation of factual findings, it referenced facts that were proven by way of Coleman's statements. Defendant argues that when the trial court stated delivered this combined factual findings, it impermissibly relied upon Coleman's statements in reaching its verdict against defendant. We disagree.

The trial court is presumed to possess an understanding of the law that allows it to recognize the difference between admissible and inadmissible evidence. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). Upon careful review of the record, it is clear the trial court mentally separated the evidence admitted against Coleman from that admitted against defendant when rendering the verdict.

However, even if the trial court did impermissibly rely upon Coleman's statements, the error was harmless because the evidence against defendant was overwhelming. The elements of second-degree murder are (1) death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). The malice element of second-degree murder is defined as a defendant's wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm. *People v Stiller*, 242 Mich App 38, 43; 617 NW2d 697 (2000). Additionally, "[m]alice can be inferred from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id.*, quoting *People v Djordjevic*, 230 Mich App 459, 462; 584 NW2d 610 (1998).

To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement which assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Here, even excluding Coleman's statements, the evidence established beyond a reasonable doubt that defendant aided and abetted in the commission of second-degree murder. Defendant went with Coleman to a vacant field to pick up something that smelled of gasoline. Coleman told defendant that he was going to burn down a house and had been paid an "eight ball" to do so. On their way to the house, Coleman asked defendant to serve as a lookout. Defendant knew which house was to be burned when Coleman kept walking around it. Defendant waited and watched as Coleman circled the house, lit a rag, and threw a glass jar inside a small hallway of the house. When defendant saw flames, he "took off running." The fire was set in proximity of the security bars on the front door. As a result, the victim was unable to escape by way of the door. The victim was found in the bathtub, his death caused by soot and smoke inhalation and severe burns. Although defendant indicated that he did not know anyone

was in the house, the natural tendency of burning a house in a residential neighborhood would be to cause death or great bodily harm. We find this evidence sufficient to prove that defendant aided in the commission of second-degree murder. See *Djordjevic, supra* at 463 (the danger of setting fire to a building with residences nearby was sufficiently high to allow the conclusion that death or great bodily harm was the natural tendency of the act).

Moreover, the portions of Coleman's statements which defendant argues the trial court improperly relied upon did not establish elements of the charged crime. Defendant specifically objects to the trial court's finding that the defendants (without distinguishing between the two) took the incendiary device to the house with the motive to scare the victim whom they knew was in the house. However, neither defendant's knowledge of occupancy of the home nor Coleman's motive were required to convict him as an aider and abettor of second-degree murder. Therefore, we find that even if the trial court improperly relied on Coleman's statements in determining defendant's guilt, the error was harmless because the essential elements of the crime were proven beyond a reasonable doubt even without Coleman's statements.

III. Suppression of Defendant's Statement to Police

Next, defendant argues that the court erred by failing to suppress defendant's statement to police. We disagree.

A trial court's ruling on a motion to suppress evidence will not be reversed unless that decision is clearly erroneous. *People v Stevens,* 460 Mich 626, 630; 597 NW2d 53 (1999). A decision is said to be clearly erroneous where, after a review of the record, this Court is left with a definite and firm conviction that a mistake had been made. *People v Armendarez,* 188 Mich App 61, 65-66; 468 NW2d 893 (1991).

Defendant argues that the police failed to "scrupulously honor" his assertion of the right to remain silent. In *People v Slocum (On Remand),* 219 Mich App 695, 702-703; 558 NW2d 4 (1996), this Court explained that two highly relevant considerations in determining whether renewed questioning after assertion of the privilege is constitutional are whether a significant period of time had elapsed since the defendant invoked his right to remain silent and whether the defendant was readvised of his *Miranda*[6] rights.

In this case, defendant was interrogated on two occasions. Defendant's entire argument is based on his contention that a significant period of time did not pass before the second attempt at questioning defendant was made. Specifically, defendant asserts that the first questioning was at 5:10 a.m. However, the record reveals that the second questioning actually took place at 5:55 p.m. Therefore, the period of time that passed between interviews was actually about twelve hours, not forty-five minutes. Furthermore, it is undisputed that defendant was readvised of his *Miranda* rights before the second interview. Given the fact that almost twelve hours passed between interviews, and given the fact that "defendant had no reason to believe that they would not honor the privilege if [he] against asserted it," *Slocum, supra* at 705, it cannot be said that the

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[6] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

police were "'persisting in repeated efforts to wear [his] resistance and make [him] change [his] mind.'" *Id*., quoting *Michigan v Mosley*, 423 US 96, 105-106; 96 S Ct 321; 46 L Ed 2d 313 (1975), after remand 72 Mich App 289 (1976). Defendant does not otherwise attempt to show that his waiver was not made voluntarily, knowingly, and intelligently. See *People v Abraham*, 234 Mich App 640, 645-655; 599 NW2d 736 (1999). Therefore, the court's denial of defendant's motion to suppress was not clear error.

IV. Defendant's Wavier of a Jury Trial

Finally, defendant argues that he did not knowingly and understandingly waive his right to jury trial. We disagree.

There is no constitutional right to waive a jury trial. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Nor is there any requirement that a trial court give the in-depth explanation of waiver of the right to trial by jury that defendant claims was necessary. MCR 6.402(B) provides:

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceedings.

A review of the hearing in which defendant's waiver took place indicates the court complied with these requirements. Defendant received an adequate explanation of his waiver and the waiver was made knowingly, voluntarily, and understandingly. We note that the defendant did not demonstrate any concern about waiving his right to jury trial at any time after the waiver hearing or during trial. Defendant signed a written waiver form indicating that he knowingly waived his right to jury. Therefore, the court's determination that defendant validly waived his right to a jury trial was not error.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood